Supreme Court, U.S.
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No. 98-1857

IN THE

Supreme Court of the United States

ESPERANCE, LTD.,

Petitioner,

—v.—

DEN NORSKE BANK ASA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit err in not reversing the Southern District of Florida's dismissal of a complaint against an agency or instrumentality of a foreign sovereign for want of subject matter jurisdiction pursuant to the Foreign Sovereign Immunity Act when it affirmed the dismissal of the complaint on *forum non conveniens* grounds?

2. Did the Eleventh Circuit err in not reversing the Southern District of Florida's dismissal of a complaint against an agency or instrumentality of a foreign sovereign for lack of personal jurisdiction when it affirmed the dismissal of the complaint on *forum non conveniens* grounds?

RULE 29.6 STATEMENT

Respondent Den norske Bank ASA is majority owned by the Kingdom of Norway through Norway's Government Bank Investment Fund and the Government Bank Insurance Fund. Respondent Den norske Bank has no nonwholly owned subsidiaries.

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Respondent Den norske Bank ASA ("DnB" or "Respondent") respectfully submits this Brief in opposition to the Petition filed by Esperance Ltd. ("Esperance" or "Petitioner") for a writ of certiorari to the United States Court for the Eleventh Circuit.[1]

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Since the Eleventh Circuit Court of Appeals affirmed on the ground of *forum non conveniens* we begin with a discussion of the underlying transactions. Respondent DnB, a Norwegian bank majority owned by the Norwegian government, entered into a series of contracts in England with entities controlled by Wilhelm Blystad, who is not a United States citizen, and members of his family. Petitioner, a Liberian corporation with its registered office in Monrovia brought this action principally as the assignee of three other alien corporations controlled by the Blystad family: (i) South Pacific Banking Corporation ("SPBC"), a Vanuatu bank wholly owned by Esperance; (ii) Sokana Industries, Inc. ("SII"), a Liberian corporation wholly owned by SPBC; and (iii) Sokana Industries Limited ("Limited"), an English company wholly owned by SII.

In 1989, Wilhelm Blystad approached DnB for financing to acquire Astilleros Unidos de Veracruz, S.A. de C.V. ("AUVER"). AUVER operated a shipyard in Veracruz, Mexico. Following more than a year of discussion and negotiation, almost exclusively in London, England and Oslo, Norway, a series of operative financial agreements

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[1] Esperance's Petition for Writ of Certiorari will be cited as "Petition" or "Pet." The Appendix to Esperance's Petition will be cited as "P. App." The Appendix to this Brief in Opposition will be cited as "R. App."

were drafted and closed in London enabling the Blystad-controlled entities to acquire control of AUVER with financing provided by DnB. The operative financial agreements state that all disputes arising from or related to the agreements are to be governed by English law and are to be adjudicated by English courts. Pursuant to the operative financial agreements, DnB extended a $15 million loan facility to SPBC secured by SPBC's holdings in SII. The vast majority of the $15 million was transferred from one Blystad-controlled entity to another until Limited held $13.9 million for use in its acquisition of 95% of the shares in AUVER for $18.5 million. DnB also contracted to transfer certain sovereign debt securities and $1,550,000 in cash in exchange for a subscription of 23,700,000 Redeemable Preferred Shares in SII. SII's redemption obligations were guaranteed by three Blystad-controlled entities including SPBC and Esperance.

Once DnB extended the financing for Limited to purchase AUVER, DnB managed its lending relationship with the Blystad-controlled entities from its Oslo offices. As AUVER experienced difficulties, DnB dispatched a junior bank officer from its Oslo office to Mexico to observe the way AUVER was conducting business.

In May 1991 - after the financing described above had been arranged and documented - SII retained Freyre & Co., Inc. ("Freyre"), a financial advisor with offices in Mexico and the United States, to manage the AUVER shipyard. Freyre is not a party to any of the documents establishing the lending relationship and is not even mentioned in any of the operative financial documents. The retention of Freyre was not a condition precedent to the financing arrangement involving DnB, Esperance, SPBC, SII and Limited.

AUVER's financial troubles deepened. As a result, negotiations to work out AUVER's troubles commenced between DnB and the other interested parties. The negotiations took place almost exclusively in London, Oslo, Copenhagen and Mexico.

Ultimately, the negotiations to work out AUVER's troubles failed and DnB opted to exercise its rights and remedies by declaring defaults under the various loan and security agreements.

PROCEDURAL HISTORY

Petitioner commenced the instant action in Florida state court on April 8, 1996 alleging breach of fiduciary duty, breach of covenant of good faith and fair dealing and negligent misrepresentation in connection with DnB's exercise of its contractual rights. DnB removed the action to the United States District Court for the Southern District of Florida on May 2, 1996.

A. The District Court Dismissal on Four Grounds Including *Forum Non Conveniens*

DnB moved to dismiss the action on four grounds: (i) lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunity Act (the "FSIA"), because DnB is an agency or instrumentality of a foreign sovereign pursuant to the FSIA; (ii) *forum non conveniens* because this action arises between foreign parties arising out of activities with no connection to the United States; (iii) lack of personal jurisdiction; and (iv) improper venue under 28 U.S.C. § 1391(f) and under the forum selection clauses contained in the agreements upon which Petitioner asserted its claims.

Following comprehensive briefing of the arguments raised in DnB's motion to dismiss, United States Magistrate

Judge Stephen T. Brown issued a report recommending that the action be dismissed on all four grounds: (i) lack of subject matter jurisdiction under the FSIA; (ii) *forum non conveniens*; (iii) lack of personal jurisdiction; and (iv) improper venue. P. App. at 7a-11a. The United States District Court for the Southern District of Florida affirmed Magistrate Judge Brown's report in its entirety. *Id.* at 13a.

B. The Eleventh Circuit Affirmed Exclusively on *Forum Non Conveniens* Grounds

Petitioner appealed the Southern District of Florida's holding to the Eleventh Circuit. In an unpublished per curiam decision, the Eleventh Circuit affirmed the district court's judgment exclusively on *forum non conveniens* grounds without addressing any other grounds for dismissal. R. App. at 1a. Petitioner failed to include a complete copy of the Eleventh Circuit's decision in the Appendix to its Petition. Instead, Petitioner attached the table opinion published at 166 F.3d 353. P. App. at 1a. Petitioner not only withheld the basis of the Eleventh Circuit's judgment in its Petition, but failed to use the phrase *forum non conveniens* even once in its Petition.

REASONS FOR DENYING THE PETITION

I. THE QUESTIONS PRESENTED BY PETITIONER ARE MERELY ACADEMIC BECAUSE THE ELEVENTH CIRCUIT'S DISMISSAL ON *FORUM NON CONVENIENS* GROUNDS IS DISPOSITIVE

Although Petitioner's questions and argument focus exclusively on jurisdictional issues, the Eleventh Circuit's judgment was based solely on *forum non conveniens* grounds. The Eleventh Circuit did not even adjudicate any FSIA jurisdictional issues in its per curiam opinion. The Eleventh Circuit's finding on *forum non conveniens* was dispositive. *See In re Minister Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998) (a court may dispose of an action on any dispositive grounds, including *forum non conveniens*, before examining whether jurisdiction exists under the FSIA). In failing to even allude to *forum non conveniens* in the Petition for Writ of Certiorari, Esperance has not only mischaracterized the record below, but ignored the only ground upon which the Eleventh Circuit ruled.

In light of the fact that the only basis for the dismissal of Petitioner's claims examined by the Eleventh Circuit has not been addressed by the Petitioner, the questions Petitioner presents can be charitably characterized as academic. The Supreme Court does not sit to address such academic questions. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("this Court does not sit to satisfy a scholarly interest").

Esperance has wisely chosen not to challenge the Eleventh Circuit's *forum non conveniens* holding. The decision to dismiss an action on *forum non conveniens*

grounds is entrusted to the sound discretion of the district court and will only be reversed "when there has been a clear abuse of discretion." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

The district court in no sense abused its discretion. Dismissal for *forum non conveniens* is appropriate when: (1) an adequate alternative forum is available; and (2) the weighing of public and private interest factors favors dismissal. *Id.* at 241 n. 6, 254 n. 22. A cursory review of these factors underscores the propriety of the district court's dismissal on *forum non conveniens* grounds and the Eleventh Circuit's affirmation.

First, England is not only an adequate alternative forum, but the one the parties chose to address all actions arising out of the lending relationship. Significantly, Esperance never challenged the adequacy of the English courts before the Eleventh Circuit.

Second, the private and public interests all point to England as the appropriate forum.

The private interest factors are those which enable a court to "weigh relative advantages and obstacles to fair trial." *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.*, 330 U.S. 501, 508 (1947). The choice of law and forum selection clauses indicate that the parties expected to have their disputes heard by English courts applying English law. England is not only the chosen forum, but also a more practical forum than the United States. Much of the conduct at issue in this case, including the negotiation and closing for the financing documents, transpired in England. As a result, a large number of witnesses and documents are located in England. Many witnesses not in England are located elsewhere in Europe. Furthermore, several potential witnesses are, by virtue of their domicile "immune from the

compulsory process of American courts." *Pain v. United States Technologies Corp.*, 637 F.2d 775, 787 (D.D.C. 1980), *cert. denied*, 454 U.S. 1128 (1981) (Norwegian witnesses and documents); *Dahl v. United States Technologies Corp.*, 632 F.2d 1027, 1030 (3d Cir. 1980) (defendant "could not compel the attendance of these Norwegian witnesses at trial in Delaware"). The witnesses not subject to process in the United States include former DnB employees who were actively involved in the negotiations in connection with the AUVER transaction. As a result, England is a far more convenient forum for the litigants than the United States.

The public interest considerations relevant to a *forum non conveniens* analysis include "the administrative difficulties flowing from court congestion; . . . the avoidance of unnecessary problems in conflict of laws, or *in the application of foreign law* . . . ." *Piper Aircraft*, 454 U.S. at 241 n. 6 (internal quotation omitted) (emphasis added). Because of the choice of law provisions in the documents underlying this dispute, a court sitting in the United States would likely be required to apply English law to adjudicate this action. The United States has no interest in the litigation. All of the parties to the action reside outside the United States and all the alleged conduct giving rise to Petitioner's claims occurred outside the United States.

The Southern District of Florida did not abuse its discretion in dismissing on the ground of *forum non conveniens*, and the Eleventh Circuit Court of Appeal correctly affirmed. There is no split among the Circuit Courts of Appeals on the application of *forum non conveniens*, and the District Court and Eleventh Circuit merely applied the principles articulated by this Court in the *Gulf Oil* and *Piper Aircraft* cases.

II. THE DISTRICT COURT'S FSIA ANALYSIS IS CONSISTENT WITH PRECEDENT AND CORRECT

Even if the Eleventh Circuit had based its opinion on the district court's finding that subject matter jurisdiction was lacking under the FSIA, the Petition should still be denied. The district court merely applied a routine FSIA analysis in reaching a holding that is unquestionably consistent with prior appellate opinions.

A. There is no conflict with any appellate opinions

The agencies or instrumentalities of a foreign state are "presumptively immune from the jurisdiction of United States courts; unless a specific exception" to the FSIA applies. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see* 28 U.S.C. § 1604. Petitioner concedes that DnB qualifies as an agency or instrumentality of a foreign state because it is majority owned by the Norwegian government. Petitioner only alludes to one exception to the FSIA, the commercial activity exception codified at 28 U.S.C. § 1605(a)(2).

Although Petitioner correctly points out that different federal courts have reached potentially inconsistent results concerning what qualifies as "commercial activity" and "direct effect," Petitioner has neither (i) identified a single split among the circuits relevant to their claims that DnB's conduct satisfies the commercial activity exception to the FSIA nor (ii) identified a single inconsistency between the district court's holding and any appellate opinions.

B. The district court correctly found the commercial activity exception inapplicable

The Southern District of Florida correctly held that DnB's conduct relating to its agreements with the Blystad-controlled entities and the AUVER shipyard did not satisfy the commercial activity exception.

Petitioner appears to assert two prongs of the commercial activity exception: "an act performed in the United States in connection with commercial activity outside the United States" and "an act outside . . . the United States in connection with a commercial activity of the foreign state elsewhere . . . [that] causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The district court rejected each of these arguments.

First, the district court simply found that Esperance "failed to show that this action arises out of any act which was performed in the United States." P. App. at 6a. This finding is unremarkable in light of the fact that Esperance's claims do not rely on any alleged communication between DnB and any individual or entity in the United States..

The district court also found that the mere fact that a Blystad-controlled entity hired a Florida management company for the AUVER shipyard did not create a direct effect. In *Republic of Argentina v. Weltover, Inc.* the Supreme Court indicated that an effect is only direct "if it follows as an immediate consequence of the defendant's [. . .] activity." 504 U.S. 607, 618 (1992). Any effect on Freyre - which is not a party to the case - was not the immediate consequence of DnB's alleged conduct, but merely an incidental result.

III. THE FLORIDA STATUTES ARE IRRELEVANT TO THIS CASE

In its final argument, Petitioner attempts to create a constitutional issue by claiming that Florida's international banking and business statutes "may be considered inconsistent with the FSIA and the commercial activity exception." Pet. at 16. However, the Supreme Court has repeatedly and unambiguously indicated that the FSIA provides the exclusive basis for jurisdiction over a foreign state or its agencies or instrumentalities. *Saudi Arabia v. Nelson*, 507 at 355. As a result, any reference to the Florida statute is irrelevant to the jurisdictional issues raised by Petitioner.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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